ORAL ARGUMENT SCHEDULED FOR JANUARY 25, 2019
Nos. 18-1124, 18-1168

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

International Longshore & Warehouse Union

Petitioner/Cross-Respondent

v.

National Labor Relations Board
Respondent/Cross-Petitioner

and

International Association of Machinists and Aerospace Workers, AFL-CIO;
District Lodge 190; Local Lodge No. 1546
Intervenors

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

PETITIONER'S FINAL OPENING BRIEF

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel for Petitioner/Cross-Respondent in the above-captioned matter submits this Certificate of Parties, Rulings, and Related Cases.

A. Parties and Amici.

1. International Longshore and Warehouse Union ("ILWU") is the Petitioner/Cross-Respondent.

2. The National Labor Relations Board ("Board") is the Respondent/Cross-Petitioner.

3. International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190 and Local Lodge No. 1546 (together "IAM") were Charging Parties in the proceeding before Region 32 of the Board, and are Intervenors-Respondents in this appeal.

B. Rulings Under Review.

ILWU seeks review of the Board's Decision and Order in *Ports America Outer Harbor, LLC, et al.*, Case Nos. 32-CA-110280 and 32-CB-118735, reported at 366 NLRB No. 76 (May 2, 2018), and the decision and order the National Labor Relations Board entered on November 18, 2016, which denied ILWU's appeal of the Administrative Law Judge's August 29, 2016 and September 7, 2016 orders.

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C. Related Cases.

To the best of counsel's knowledge, no related cases are currently pending in this Court or in any other federal court of appeals, or in any other court in the District of Columbia.

Dated: November 30, 2018

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By: /s/ Lindsay R. Nicholas

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner/Cross-Respondent ILWU makes the following disclosures:

International Longshore and Warehouse Union is an unincorporated association constituting a labor union under federal labor law.

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GLOSSARY

ALJ	Administrative Law Judge
D&O	*Ports America Outer Harbor, LLC, et al.*, 366 NLRB No. 76 (May 2, 2018) (JA 1738-1756)
GC	General Counsel
IAM	International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190 and Local Lodge No. 1546
ILWU	International Longshore and Warehouse Union
JA	Joint Appendix
JPLRC	Joint Port Labor Relations Committee
M&R	Maintenance and Repair of cargo-handling equipment
MTC	Marine Terminals Corporation and MTC Holdings, Inc.
PAOH	Ports America Outer Harbor, LLC (aka Outer Harbor Terminal, LLC)
PCCCD	Pacific Coast Clerks' Contract Document
PCL&CA	Pacific Coast Longshore and Clerks' Agreement
PCLCD	Pacific Coast Longshore Contract Document
PCMC	Pacific Crane Maintenance Company
PMA	Pacific Marine Maintenance Company
PMMC	Pacific Marine Maintenance Company
SA	Supplemental Appendix
ULP	Unfair Labor Practice

STATEMENT OF JURISDICTION

This proceeding arises from the decision in *Ports America Outer Harbor, LLC, et al.*, Case Nos. 32-CA-110280 and 32-CB-118735, reported at 366 NLRB No. 76 (May 2, 2018) (hereinafter "D&O") ("Joint Appendix," JA 1738-1756) and the decision and order of the NLRB entered on November 18, 2016, which denied ILWU's appeal of the Administrative Law Judge's ("ALJ") August 29 and September 7, 2016 orders (JA 381-399, 414-416). The Board had subject matter jurisdiction over the underlying proceeding pursuant to §10(a) of the NLRA, 29 U.S.C. §160(a).

ILWU filed a petition for review on May 9, 2018. The Board filed a cross-application for enforcement on June 20, 2018. Intervenors International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190 and Local Lodge No. 1546 (together "IAM") were granted leave to intervene on June 26, 2018. This Court has jurisdiction and proper venue over these consolidated proceedings pursuant to §§10(e) and (f) of the NLRA, 29 U.S.C. §§160(e), (f).

ISSUES PRESENTED FOR REVIEW

1. Whether the Board committed reversible error by denying ILWU its right to put on its case and its defenses and failing to admit relevant evidence.

2. Whether the Board committed reversible error by imputing PCMC's unremedied ULPs to PAOH.

3. Whether the Board committed reversible error by finding that PAOH was a *Burns* successor to PCMC.

4. Whether the Board committed reversible error by finding that ILWU violated the Act by accepting recognition and serving as the bargaining representative of PAOH's mechanics in July 2013.

5. Whether the Board committed reversible error by refusing to consider the extensive evidence of accretion into the coastwise longshore bargaining unit and ILWU's uncoerced majority support among the alleged unit.

6. Whether the Board committed reversible error by denying ILWU's appeal of the ALJ's approval of the settlement among IAM, PAOH, and MTC.

7. Whether the Board committed reversible error by ordering an affirmative bargaining order and awarding a remedy of reimbursement of union dues and fees against ILWU under the unique circumstances of this case.

RELEVANT STATUTES AND REGULATIONS

See Addendum for pertinent excerpts.

STATEMENT OF THE CASE

I. Factual Background

A. The ILWU Coastwise Bargaining Unit

The Pacific Maritime Association ("PMA") is a multi-employer association of approximately 75 waterfront employers, including ocean carriers, stevedore and

terminal operating companies, and waterfront maintenance and repair ("M&R") companies. (JA 237-238, 1666). PAOH was a member of PMA. (JA 77, 220, 238, 1622).

For the past 80 years, PMA has recognized and bargained with ILWU as the collective bargaining representative of a single, coastwise bargaining unit of all longshore workers, marine clerks, and longshore mechanics employed in Pacific Coast ports by PMA-member companies. (JA 189, 218-219, 237-238, 1668-1670; *see* JA 1234-1485). The Board first certified the longshore unit for the entire West Coast eight decades ago, *Shipowners' Ass'n of the Pacific Coast*, 7 NLRB 1002 (1938), and has repeatedly reaffirmed it. *See, e.g., Pac. Maritime Ass'n*, 256 NLRB 769 (1981); *ILWU (Cal. Cartage Co.)*, 208 NLRB 994 (1974).

The coastwise longshore bargaining unit comprises approximately 15,000 registered longshoremen and clerks, along with several thousand nonregistered "casual" workers. The coastwise bargaining unit is covered by a single collective bargaining agreement called the Pacific Coast Longshore and Clerks' Agreement ("PCL&CA"). (JA 222, 1234-1485). This is set forth in two separate documents. (*Id.*). The Pacific Coast Clerks' Contract Document ("PCCCD") governs all marine clerks. The Pacific Coast Longshore Contract Document ("PCLCD") governs all longshore workers, including longshore mechanics, who have been part of the longshore unit for decades. (JA 1234-1485); *see Pac. Maritime Ass'n*, 256 NLRB at 769-70.

Longshore mechanics are explicitly included in the PCLCD's description of the coastwise unit. (JA 1250-1253, 1658). Some work for terminal operators and stevedoring companies that perform mechanic work in-house. (JA 1649-1650). Many others work from various PMA M&R companies. (*Id*.) At all times material, ILWU longshore mechanics have worked in nearly all West Coast ports where PMA companies operate, including the Port of Oakland. (JA 1671).

The ILWU coastwise bargaining unit has a single coast-wide registration and dispatch system that applies to all members. (JA 1651-1653). Members of the ILWU coastwise bargaining unit are registered as either limited registered Class B or fully registered Class A longshoremen. (*Id.*). Unit members working as mechanics are part of this coast-wide registration system. (*Id.*). Many longshoremen work out of the ILWU-PMA Joint Dispatch Hall ("Dispatch Hall") accepting jobs on a day-to-day basis performing mechanic or other longshore work for various employers. Longshoremen also obtain steady employment working as a mechanic or other type of longshore worker for a single employer. (JA 185, 1651-1655). And, some longshoremen are hired off the street to work as ILWU mechanics for a single employer on a steady basis. (JA 185, 1654-1655). Longshoremen hired on a steady basis by a single employer are called "steadies." (JA 1653). If a steady, including a steady mechanic, is laid-off from steady employment, they return to the Dispatch Hall where they can obtain mechanic and other longshore and clerk jobs

for multiple PMA-member companies. (JA 1653, 1655).

B. The *PCMC* Case

Prior to March 31, 2005, PMMC was an M&R contractor for Maersk at Berths 20-24 at the Port of Oakland. PMMC employed mechanics to perform M&R work, with the exception of crane M&R work, and was party to a collective bargaining agreement with IAM. Effective March 31, 2005, PCMC took over all of the M&R work at Berths 20-24, hired many of PMMC's former mechanics, and recognized ILWU as the collective bargaining representative for all of its mechanic workforce. As a result, IAM filed ULP charges against PCMC and ILWU. Thereafter, the GC issued a complaint alleging that PCMC violated the Act by failing to recognize IAM, and ILWU violated the Act by accepting recognition as the mechanics' collective bargaining representative.

On February 12, 2009, ALJ Anderson issued a decision dismissing the ULP allegations and finding that the mechanics had accreted to the ILWU coastwise unit. This was the only operative decision in the *PCMC* case through spring of 2013. *See PCMC/Pacific Crane Maintenance Company, Inc., et al. (PCMC I)*, 359 NLRB 1206 (2013).

C. In 2009, PAOH Began Operating a Marine Terminal at the Port of Oakland and Contracted with PCMC To Perform M&R Work.

PAOH formed in February 2009. (JA 72). PAOH intended to join PMA, operate a marine terminal at Berths 20-24 at the Port of Oakland ("Outer Harbor")

under the PCL&CA, and hire ILWU labor. (JA 77, 161, 164, 166). In August or September 2009, PAOH met with PMA regarding the commencement of its operations. (JA 162). They had already decided to join PMA and understood that this required them to use ILWU labor. (JA 162-163). PAOH met with ILWU Local 10 in October 2009 and explained that PAOH would handle M&R work at Outer Harbor in compliance with the PCL&CA. (JA 141, 165; *see* JA 1206-1207).

Effective January 1, 2010, PAOH leased Outer Harbor and began operating the terminal. ("Supplemental Appendix," SA 1, JA 1659). Pursuant to its obligation under the PCL&CA, PAOH hired ILWU longshoremen and marine clerks to perform the work for its operation. (JA 148-149, 215). PAOH hired some longshoremen on a steady basis, such as heavy equipment operators. (JA 111, 138). PAOH also hired longshoremen and clerks out of the Dispatch Hall; in fact, the majority of PAOH's longshore and clerk workforce came from the Dispatch Hall. (JA 110, 146-147, 151-152). PAOH regularly attended Joint Port Labor Relations Committee ("JPLRC") meetings with PMA and ILWU to address labor relations matters. (JA 78, 136-137).

In preparing to commence operations at Outer Harbor, PAOH considered various options for the M&R work it would require. (JA 155-156). One option PAOH considered was handling the M&R work in house. (JA 76, 139-140). PAOH also considered contracting with a company called Terminal Maintenance Company. (JA 1208). PAOH also had the option of contracting with the company that A.P.

Moller Terminals ("APM"), the prior marine terminal operator of Outer Harbor, had used. (JA 73). PCMC was providing M&R services to APM as well as other terminal operators at other locations at the Port of Oakland, including at Berth 30 and at Berths 55-56. (JA 30, 45-46, 107). PCMC had a practice of moving its managers and mechanics among all of the locations where it provided M&R services in the Port of Oakland. (*Id.*).

PAOH ultimately decided to contract with PCMC to handle the M&R work at Outer Harbor. (JA 79, 158-160). PAOH and PCMC negotiated an equipment maintenance agreement, and PCMC continued to use an ILWU workforce to perform the M&R work at Outer Harbor. (JA 1205; *see* JA 73).

In early October 2010, PAOH leased Berths 25-26 and expanded its operation to encompass Berths 20-26 ("Outer Harbor"). (JA 86, 171). Berths 25-26 had previously been operated by Transbay Container Terminal ("TBCT"), and PCMC hired a significant number of mechanics who had worked for TBCT before its closure. (JA 80, 83). IAM did not make a claim for the M&R work at Berths 25-26 to PAOH. (JA 172). No ULP charges were filed regarding these events. (JA 70).

D. In 2013, PAOH Did Not Renew Its Contract with PCMC, Took Its M&R Work in House, and Hired a Mechanic Workforce Under the PCL&CA.

In early 2013, with the expiration of its M&R contract with PCMC fast approaching, PAOH considered other options for the M&R work at Outer Harbor.

(JA 142). PAOH had received complaints from customers and was concerned about PCMC's performance. (JA 105-106, 129, 154, 202, 212-213). PAOH considered various options, including renewing the contract with PCMC, hiring a new company to perform the M&R work, and taking the M&R work in house. (JA 117-118, 142).

In March 2013, PAOH decided it would not renew its contract with PCMC and notified PCMC on March 22, 2013. (JA 88-90, 1210). PAOH then issued an RFP soliciting bids for the M&R work at Outer Harbor. (JA 91, 118-119, 1211-1218). PCMC as well as a number of other companies submitted proposals. (JA 92, 172). PAOH reviewed the proposals and ultimately decided to take the M&R work in house. (JA 120, 143). PAOH made this decision because it expected to save approximately $2 million and believed it could better serve its customers by handling M&R work in house. (JA 93, 108-109, 130-131, 173, 201). PAOH made its final decision in May 2013 and notified PCMC. (JA 144, 173).

Around the same time that PAOH planned to take its M&R work in house, SSA, another PMA-member company operating in the Port of Oakland, decided to take its M&R work at Berths 55-56 in house, which also was being performed by PCMC. (JA 174-176, 1219-1227; *see* JA 1220). In light of this, PAOH, SSA, PMA, and ILWU negotiated the manner by which PAOH and SSA would hire ILWU mechanics, ensuring that they complied with the PCL&CA and arbitral precedent. (*Id.*). The parties held Special JPLRC meetings on June 19 and 21, 2013, to address

the issue. (JA 1219-1227). Many mechanics attended the meetings. (JA 177-178; *see* JA 1219-1227). Ultimately, they agreed to a single mechanic seniority list of all the mechanics who worked for PCMC at Outer Harbor and at Berths 55-56. (*See* JA 1219-1227). In order of seniority, the mechanics chose whether they wanted to work for PAOH at Outer Harbor or for SSA at Berths 55-56. (JA 55, 1677, 1690-1691, 1695, 1701, 1706-1707). As a result, some mechanics who had been working at Berths 55-56 chose to work for PAOH at Outer Harbor, and some mechanics who had been working at Outer Harbor chose to work for SSA at Berths 55-56. (*Id.*).

E. *PCMC I* Decision Issued and IAM Threatened that PAOH Must Recognize IAM.

During PAOH's entire existence, including when it commenced operations at Outer Harbor using an all-ILWU workforce and retained PCMC to provide M&R with ILWU labor in 2010, through its discussions, preparation, and hiring to take the M&R work in house in 2013, the only decision in the *PCMC* case was the ALJ's February 2009 decision finding no violations of the Act.

On June 24, 2013, after PAOH, SSA, PMA and ILWU had already negotiated how mechanics working at Outer Harbor and Berths 55-56 would be employed, the Board issued *PCMC I*, finding that PCMC and ILWU had violated the Act eight years earlier. 359 NLRB 1206. The Board's reasoning was based solely on the fact that PMMC and PCMC stipulated for purposes of the ULP trial that they were a single employer. That decision was void *ab initio* because it was decided by a

constitutionally infirm panel. *See PCMC/Pacific Crane Maint. Co., Inc. and/or Pacific Marine Maint. Co. LLC*, 2014 WL 2929769 (June 27, 2014), citing *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). It was not until two years later, on June 17, 2015, that the Board issued a constitutionally valid decision, *PCMC II*, in which it affirmed the June 24, 2013 decision. *PCMC/Pacific Crane Maintenance Company, Inc., et al. (PCMC II)*, 362 NLRB No. 120 (2015).

On June 28, 2013, only two days before PAOH was to begin employing mechanics, IAM's attorney sent a letter to PAOH demanding that PAOH bargain with and recognize IAM as the collective bargaining representative of PAOH's mechanics. (JA 1199-1200). PAOH received the letter on June 29th or 30th. (JA 179). This was the first time PAOH became aware that IAM was making any claim to the mechanic work at Outer Harbor. (JA 74, 153, 157).

F. PAOH Directly Employed Longshore Mechanics at Outer Harbor Along with Longshoremen and Clerks, All Under the PCL&CA.

On July 1 and 13, 2013,[1] 64 steady mechanics began working for PAOH ("PAOH mechanics"), pursuant to the agreement from the June 21, 2013 JPLRC meeting. (JA 94-95, 121, 179, 1219-1227). All the mechanics PAOH hired had

[1] The sole reason some mechanics started working on July 13, as opposed to July 1, was that PCMC's end date at Berths 55-56 was shortly after its end date at Outer Harbor. Where all mechanics would work was negotiated on June 21, 2013. (JA 1219-1227).

been and continued to be part of the ILWU coastwise bargaining unit covered by the PCL&CA as PAOH employees. (JA 180). They joined PAOH's existing ILWU-represented workforce of longshoremen and clerks, also working under the PCL&CA. (JA 181-182; *see* JA 183-184, 186-189). Eleven of these mechanics were crane mechanics, while 53 were reefer, power, or chassis mechanics.[2] (JA 1228-1231).

In sheer numbers, the longshoremen and clerks dwarfed the longshore mechanics on any given day. On July 1, 2013, PAOH's first day directly employing ILWU mechanics, PAOH had 152 people on the payroll working under the PCL&CA and only 41 (27%) of them were longshore mechanics. (JA 1619, 1646).

PAOH's mechanics included not only steadies who had worked for PCMC but longshore mechanics hired out of the Dispatch Hall. (JA 190-191, 214). As a PMA member, PAOH had access to the supplemental workforce through the Dispatch Hall and took advantage of this access by hiring mechanics from the Dispatch Hall on a near daily basis. (JA 190). During PAOH's first four weeks handling the M&R work in house, between 13.3% and 31.0% of PAOH's mechanic workforce came from the Dispatch Hall. (JA 1620, 1646). Between July 1 and December 31, 2013, a total of 194 longshoremen performed M&R work for PAOH,

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[2] The D&O states that the unit at issue does not include crane mechanics. (D&O at 3, n.8, JA 1740).

counting both PAOH's steady mechanics and workers from the Dispatch Hall. (JA 1487-1614, 1683). And, 91 longshoremen performed at least 50 hours of M&R work for PAOH between July and December 31, 2013, counting both steady mechanics and hall workers. (JA 1621, 1646). Of those, more than 30% came from the Dispatch Hall. (*Id.*).

PAOH's mechanic workforce was fluid, not only because PAOH hired longshoremen out of the Dispatch Hall, but also because PAOH's steady mechanics came and went. PAOH hired about 11 new steady mechanics after July 1, 2013. These were both longshoremen who had been working out of the Dispatch Hall and individuals hired off the street, all pursuant to the PCL&CA. (JA 1615, 1645). Some steady mechanics also chose to leave their steady mechanic jobs at PAOH and return to the Dispatch Hall where they took M&R jobs and other longshore jobs for a variety of PMA employers or secured other steady longshore jobs. (JA 1615-1616, 1623-1626, 1678-1679).

G. PAOH Filed for Bankruptcy and Shut Down Its Operations at Outer Harbor in 2016.

In late 2015, PAOH filed for bankruptcy with the intention of closing its operation at Outer Harbor. (JA 246-247). In mid-2016, PAOH shut down and sold off its assets. (*Id.*). All of PAOH's longshore and clerk workforce, including mechanics, were laid-off and sent to the Dispatch Hall. (JA 1627, 1679-1681). All of the steady mechanics working for PAOH continued to have jobs, either new

steady longshore jobs with other PMA companies or daily jobs out of the Dispatch Hall, solely because they were part of the ILWU coastwise bargaining unit. (*Id.*).

Outer Harbor is vacant and non-operational. (JA 246-247). As stipulated by all parties, PAOH will cease to exist following the conclusion of its bankruptcy proceedings. (*Id.*).

II. Procedural History

A. ULP Complaint Allegations

On July 30, 2013, IAM filed a ULP charge against PAOH, amended on September 19, 2013, alleging violations of Sections 8(a)(1), (2), and (5) of the NLRA. (JA 249). On December 6, 2013, IAM filed a ULP charge against ILWU, alleging violations of Sections 8(b)(1)(A), (1)(B), and (2) of the NLRA. (JA 250).

On December 31, 2014, the GC issued a ULP complaint on these charges. The complaint alleged violations of Sections 8(a)(1), (2), and (5) and Sections 8(b)(1)(A) and (2), alleging that PAOH was both a *Burns* successor and a *Golden State* successor to PCMC. The complaint's sole allegation against ILWU was that it had unlawfully accepted recognition from PAOH as the bargaining representative of the mechanics performing M&R work at Outer Harbor and applied the terms of the PCL&CA to such mechanics at a time when ILWU did not represent an uncoerced majority of such employees.

The trial occurred over 17 days between October 19, 2015, and September 16,

2016. After six days of trial, the GC sought leave to amend the complaint to allege an alternate theory that PAOH and another company, MTC Holdings/MTC ("MTC"), were a single employer. Leave was granted and the parties proceeded with trial for another eight days during which the GC continued to present her case. On August 30, 2016, the GC filed a motion to withdraw all allegations against MTC and some allegations against PAOH, a requirement of a non-Board partial settlement into which IAM, PAOH, and MTC had entered. (JA 400-404). The ALJ granted the motion, leaving only the allegations that PAOH was a *Burns* successor and that ILWU violated the Act by representing the PAOH mechanics. (JA 410-411). The allegation that PAOH was a *Golden State* successor was removed from the Second Amended Consolidated Complaint (hereafter referred to as "Complaint"). (JA 417-428). The GC also removed her request for a bargaining order from the Complaint. (*Id.*). The Complaint only sought an order that PAOH withdraw recognition from ILWU and that ILWU disclaim representation of the alleged unit and reimburse unit employees for any initiation fees and dues paid to ILWU. (*Id.*).

B. IAM, PAOH and MTC Entered into, and the ALJ Approved a Non-Board Partial Settlement Despite Serious Improprieties.

In July 2016, IAM, PAOH and MTC agreed to a tentative settlement. On August 17, 2016, IAM filed a copy of the final settlement agreement. (JA 356-368). The settlement purported to resolve all allegations against MTC as well as the allegation of *Golden State* successorship as to PAOH in return for $3 million to be

paid directly to IAM. The settlement also provided that there would be no further remedy against PAOH, except for mailing a notice, as a result of the continuing litigation. ILWU objected to the settlement, as did the GC initially. Specifically, ILWU raised concerns about whether the intended distribution of settlement monies served the public interest and whether the distributions would, in fact, remedy the ULPs the settlement purported to resolve. Despite these concerns, the ALJ approved the settlement. (JA 381-399). ILWU filed a motion seeking reconsideration and provided additional evidence that IAM had made false statements and inaccurate representations regarding the settlement and how it intended to distribute the money. The ALJ granted reconsideration but denied on the merits. (JA 414-416). Thereafter, ILWU filed a motion for permission to appeal approval of the settlement, and the Board granted permission but denied on the merits finding that the ALJ had not abused her discretion in approving the settlement. (JA 429-448, 449-1188); Board Order, dated November 18, 2016, JA 1712-1713).

C. The ALJ Barred ILWU from Putting on Its Defenses and Evidence.

After 14 days of trial, during which the GC put on her case, ILWU commenced its case. Very early in the presentation, the ALJ ruled that Respondents were precluded from putting on an accretion defense. (JA 226-229, 240). Shortly thereafter, the ALJ also ruled that Respondents were precluded from arguing that the alleged unit was no longer appropriate and that PAOH had a good-faith doubt as to

IAM's majority support by the unit. (JA 240). The ALJ also ruled that ILWU was precluded from putting on evidence that it had uncoerced majority support among the alleged unit. (JA 234, 240).

ILWU presented a seventy-page written Offer of Proof (JA 1643-1711) and 227 exhibits (*see id.*; rejected R-ILWU 1-157, 159, and 161-226; admitted R-ILWU 158, 160 and 227) in support of its defenses. The ALJ rejected the Offer of Proof and the exhibits cited therein. (JA 242). The parties also entered into a stipulation authenticating many exhibits, but the ALJ still rejected those exhibits. (JA 239-240, 1628-1642). ILWU requested that the ALJ admit the *PCMC* record and exhibits as well, but the ALJ also denied that request. (JA 244-245).

D. ALJ and Board Decisions

On December 1, 2016, the ALJ issued a decision in which she did not reverse her ruling barring ILWU from putting on its defenses and evidence, found that PAOH was a *Burns* successor to PCMC and had an obligation to recognize IAM, and found that ILWU unlawfully accepted recognition of the PAOH mechanics and applied the PCL&CA to them. (JA 1714-1737). On February 10, 2017, ILWU filed exceptions to the ALJ's decision.

On May 2, 2018, the Board issued a decision ("D&O") affirming the ALJ's decision, declining to reverse her ruling that barred ILWU from putting on its case and evidence and issuing a bargaining order and reimbursement of all fees and dues

paid by unit employees to ILWU. (JA 1738-1756).

SUMMARY OF ARGUMENT

The Board has erred in several respects and, as a result, due process and the aim and purpose of the Act have been fundamentally undercut.

The Board erred by declining to overrule the ALJ's refusal to allow ILWU to put on its defenses and evidence at trial. In violation of due process and relying on erroneous interpretations of the Act, virtually all of ILWU's evidence was rejected and, thus, not considered. Had ILWU been permitted to present its evidence, the record would have shown that PAOH was not a *Burns* successor to PCMC for three reasons. First, the evidence already in the record combined with ILWU's rejected evidence shows that the mechanics comprising the alleged unit had been fully accreted into the ILWU coastwise bargaining unit. Thus, the former IAM unit from the PMMC days was no longer appropriate in July 2013. Second, the evidence shows that majority of mechanics hired by PAOH in July 2013 chose to be represented by ILWU, not IAM. The evidence does not support a conclusion that ILWU lacked uncoerced majority support in July 2013. Third, there was no reason for PAOH to question ILWU's representation of this workforce; at minimum, PAOH had a good-faith doubt that IAM had majority, let alone any, support among the PAOH mechanics. By failing to reverse the ALJ's improper rulings and remand so ILWU could put on its case and evidence, ILWU's due process right to have this

case fully and fairly litigated was unlawfully denied.

The Board also erred by attributing PCMC's 2005 ULPs to PAOH, and on that basis alone, determining that PAOH was a *Burns* successor. The case law does not support attributing the ULPs of one employer to another, completely separate, employer as a way to turn a blind eye to the current facts and circumstances. Here, the Board simply relied on its decision in the *PCMC* case and ignored all of the changes to the unit that occurred between April 2005 (after PCMC's ULPs) and July 2013 (when PAOH hired mechanics). To wholly ignore the facts and circumstances as they were in July 2013, as well as everything that happened during the preceding eight years, does nothing to effectuate the aim and purpose of the Act.

The Board further erred by declining to overturn the ALJ's approval of a partial settlement that purported, but in fact did not, effectuate the purposes and policies of the Act. To the contrary, the undisputed evidence showed that the settlement money would be used to line the pockets of IAM and its lawyers and reward IAM's favorite allies, as opposed to making whole unit employees for their alleged losses.

Finally, the Board erred by issuing an imaginary bargaining order, which provides absolutely no remedy, because both the employer and the unit no longer exist. It is well settled that bargaining orders are extraordinary remedies that should only be issued when traditional remedies are insufficient. That simply is not the case

here. The Board, likewise, erred by ordering ILWU reimburse all current and former unit employees for all fees, dues, and other moneys paid, with interest. This exceeds the Board's statutory authority because it is punitive to ILWU and a windfall, rather than a make whole remedy, to unit employees since they would have paid similar dues to IAM. Furthermore, the affected employees received highly valuable job benefits during ILWU's representation for which they should pay their fair share, and they maintained employment after PAOH's closure only because they were represented by ILWU. IAM also secured a settlement of $3 million allegedly to make these unit employees whole, which should provide full make whole relief.

STANDING

ILWU has standing to seek review as an aggrieved party to a final order of the Board pursuant to 29 U.S.C. §160(f). *Retail Clerks Local 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965). "[S]tanding to appeal an administrative order as a 'person aggrieved,' 29 U.S.C. §160(f), arises if there is an adverse effect in fact, and does not . . . require an injury cognizable at law or equity." *Id.* (holding that union that was not a party to the settlement had standing to appeal a Board order entered as a result of settlement); *accord Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 694 F.2d 1289, 1294 (D.C. Cir. 1982).

ARGUMENT

I. Standard of Review.

The court must reverse a Board order if "the Board's findings are not

supported by substantial evidence or [] the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Micro. Pac. Dev. Inc. v. NLRB*, 178 F.3d 1325, 1329 (D.C. Cir. 1999) (internal quotations and citations omitted). "Substantial evidence is . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* The court "must take into account whatever in the record fairly detracts from the weight of the evidence cited by the Board to support its conclusions." *Cleveland Constr., Inc. v. NLRB*, 44 F.3d 1010, 1014 (D.C. Cir. 1995). Additionally, "[w]hen an agency's decision lacks adequate justification because it is neither logical nor rational, or because it fails to offer a coherent explanation of agency precedent," its decision will be vacated as arbitrary and capricious." *NBC Universal Media, LLC v. NLRB*, 815 F.3d 821, 823 (D.C. Cir. 2016). The court "may consider only the Board's own reasons, not the rationalizations of counsel." *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1080 (D.C. Cir. 1996) (citation omitted).

II. The Board Decision Must Be Vacated Because It Improperly Fails To Consider Compelling Evidence that the Alleged Unit Was No Longer an Appropriate Unit and, Thus, PAOH Was Not a *Burns* Successor Obligated To Recognize IAM.

A. The Board Legally Erred in Refusing To Overrule the ALJ's Ruling that Barred Nearly All of ILWU's Evidence and Defenses.

The Board committed legal error by refusing to reverse the ALJ's rulings barring ILWU from presenting its evidence and defenses during trial. (D&O at 3-4,

n.9-10; JA 1740-1741). The Board declined to reverse the rulings stating that the Board "will reverse a judge's evidentiary ruling only when the party urging such reversal demonstrates that the judge's ruling was not only erroneous, but also prejudicial to its substantive rights." (*Id.*). This justification for declining to overrule the ALJ fails for three reasons. First, the ALJ's ruling was not an evidentiary ruling but, rather, a broad ruling that barred ILWU from putting on any of its defenses and evidence in support thereof. Second, procedural due process rights must be vigilantly protected as they are guaranteed by the Fifth Amendment. Third, the ALJ's ruling also was prejudicial to ILWU's substantive rights because ILWU's proffered, but rejected, evidence shows that the alleged unit was no longer appropriate as of July 2013, ILWU had uncoerced majority support in the alleged unit, and PAOH had no reason to believe IAM had majority support in the alleged unit. (*See supra* Section II.B.).

"'[F]undamental principles of procedural due process . . . require meaningful notice of a charge and a full and fair opportunity to litigate it.'" *Bellagio, LLC v. NLRB*, 854 F.3d 703, 712 (D.C. Cir. 2017) (quoting *Lamar Cent. Outdoor*, 343 NLRB 261, 265 (2004)). It is well-established that these procedural due process rights guaranteed by the Fifth Amendment equally apply in the context of administrative agency actions:

> It is a basic tenet of Anglo-American law that one accused of a wrong has the right to be notified of the specific charges raised against him

> and an opportunity to defend himself against them; the tenet is capsulized in the Fifth Amendment: 'No person shall…be deprived of life, liberty, or property, without due process of law.' U.S. Const. amend. V. Due process requires the Board to afford an alleged violator *notice and an opportunity for a hearing* on a charge under the Act….In the context of the Act, due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the ULP and when the conduct implicated in the alleged violation *has been fully and fairly litigated*.

Pergament United Sales, Inc. v. NLRB, 920 F.2d 130, 134-35 (2d Cir. 1990) (omitting internal citations) (emphasis added), citing *NLRB v. Coca Cola Bottling Co.*, 811 F.2d 82, 87 (2d Cir. 1987); *see also Lamar*, 343 NLRB at 265-66 ("Congress incorporated these notions of due process in the Administrative Procedure Act."). The elements required to satisfy procedural due process are "prior notice and an opportunity to be heard, timely recital of the matters of law and fact asserted, and a fair opportunity for a defense to be prepared and litigated." *King Manor Care Center*, 308 NLRB 884, 889 (1992). In declining to reverse the ALJ's ruling, the Board wholly ignored its own acknowledgement of the vital importance and requirement of procedural due process, namely "a fair opportunity for a defense to be prepared and litigated." ILWU effectively was barred from putting on any case at all after the GC had been afforded 14 days to present her case. ILWU was denied its due process right to litigate its defenses to the ULP allegations and have those issues "fully and fairly litigated."

In addition to the blatant denial of ILWU's due process, ILWU's rejected

evidence went to the heart of the issues being litigated and, thus, should have been admitted and considered to ensure that the case was "fully and fairly litigated." Whether the alleged unit is appropriate (for example, whether the alleged unit had accreted to the ILWU coastwise bargaining unit) and whether PAOH had any reason to believe IAM had majority support, let alone any support, from the alleged unit in July 2013 must be considered when determining whether PAOH was a *Burns* successor. *NLRB v. Burns Security Servs.*, 406 U.S. 272, 281 (1972) ("It would be a wholly different case if the Board had determined that…the Lockheed unit was no longer an appropriate unit."); *Border Steel Rolling Mills, Inc.*, 204 NLRB 814, 821 (1973) ("all of the Board cases in which successorship was found are predicated on the finding that the predecessor's bargaining unit remained intact under the successor and continued to be an appropriate unit"). Similarly, whether ILWU had uncoerced majority support in the alleged unit when PAOH hired mechanics in July 2013 is crucial to determining whether the Act was violated. *See Regency Gardens Co.*, 263 NLRB 1265, 1269 (1985) (as to allegations of violation of 8(b)(1)(A) "inference is no substitute for actual proof, which is the burden of the GC, that the Union did not in fact represent a majority of the [employees] on the date of recognition"). Rejecting all of ILWU's proffered evidence regarding its defenses guaranteed that the case was not "fully and fairly litigated." *See Ozark Auto. Distribs., Inc. v. NLRB*, 779 F.3d 576, 583-84 (D.C. Cir. 2015) (vacating decision to

exclude evidence that was non-cumulative and critical to employer's defense).

To address this egregious denial of due process, ILWU requested that the Board reverse the ALJ's sweeping rulings, remand, and permit ILWU to put on its case and evidence. The Board, however, wrongly declined to do so.

B. ILWU's Proffered Evidence Compels the Conclusion that the Alleged Unit Was Not an Appropriate Unit in July 2013.

The evidence and defenses ILWU attempted to introduce at trial, all of which the Board and ALJ rejected, plainly show that the 2005 IAM-represented unit at issue in the *PCMC* case no longer existed in July 2013 and the former IAM mechanics who worked for PMMC in 2005 were accreted to the ILWU coastwise bargaining unit by July 2013. The evidence shows that the mechanics PAOH hired were integrated into PAOH's operations and PAOH's all-ILWU workforce. The evidence further shows that the majority of the PAOH mechanics chose to be represented by ILWU, whether by being members of ILWU before PCMC's 2005 ULPs or by applying for an ILWU-represented steady mechanic job and accepting that job knowing ILWU would be their bargaining representative. In all, ILWU's proffered evidence shows that neither PAOH nor ILWU violated the Act when PAOH recognized ILWU as the representative of the mechanics PAOH hired in July 2013.

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1. The Alleged Unit Was Accreted to the ILWU Coastwise Bargaining Unit.

The fundamental purpose of the accretion doctrine is to "preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir. 1985). Accretion occurs "when the employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted." *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005), quoting *E.I. Du Pont de Nemours, Inc.*, 341 NLRB 607, 608 (2004); *see also J&L Plate, Inc.*, 310 NLRB 429, 430 (1993) (accretion where group of employees "has so effectively merged into a more comprehensive unit, or is so functionally integrated that it has lost its separate identity"); *U.S. West Commc'ns*, 310 NLRB 854, 855 (1993) (finding a longstanding bargaining unit accreted to a different unit because "significant changes occurring over the years" resulted in integrated operation and "eliminated the basis on which…the unit was deemed to be an appropriate unit"). To determine whether an accretion has occurred, the Board evaluates many factors: integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees,

collective bargaining history, degree of common daily supervision, and degree of employee interchange. *Frontier Telephone*, 344 NLRB at 1271.

The alleged unit here did not exist as of July 2013 because it was accreted to the historic coastwise ILWU bargaining unit to which PAOH's workforce had always belonged. Over the intervening eight years after PCMC's ULPs and before PAOH hired mechanics, it is undisputed that significant changes occurred to the bargaining unit that existed prior to March 31, 2005. ALJ Anderson's decision recounts ample evidence of those changes in the *PCMC* record, which led him to conclude that the mechanics had accreted to the coastwise longshore bargaining unit. *See PCMC I*, 359 NLRB 1206 (2013). The evidence of accretion described in the ALJ's February 2009 decision only continued and further solidified from April 2005 through July 2013 – *another eight years*. To ignore those changes is to ignore the reality that the alleged unit accreted to the ILWU coastwise bargaining unit and was no longer appropriate in July 2013 when PAOH hired mechanics. What is more, the PAOH mechanics were only further integrated into PAOH's all-ILWU workforce in July 2013. ILWU's Offer of Proof (R-ILWU 228) and the Exhibits cited therein (R-ILWU 1-227) show that virtually all of the accretion factors were met. (*See* JA 1649-1711).

When a bargaining unit no longer conforms "reasonably well" to the "standards of appropriateness," a successor is not obliged to bargain with it. *Trident*

Seafoods, Inc. v. NLRB, 101 F.3d 111, 119 (D.C. Cir. 1996), quoting *Crown Zellerbach Corp.*, 246 NLRB 202, 203 (1979); *see also Burns*, 406 U.S. at 281. "Although the weight given to prior history of collective bargaining is 'substantial,' it is not 'conclusive.'" *Trident Seafoods*, 101 F.3d at 119, citing *AC Pavement Striping Co.*, 296 NLRB 206, 201 (1989). In *Dattco Inc.*, 338 NLRB 49 (2002), the alleged successor, who operated nine bus terminals, added a new terminal to its operation, hiring a majority of the predecessor's workforce. The Board held that despite the unit being appropriate under the predecessor, it was not appropriate under the alleged successor's operations. The Board reasoned that a unit is no longer appropriate when "it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity." *Id.* at 50; *see also P.S. Elliott Servs.*, 300 NLRB 1161 (1990) (finding unit under predecessor was no longer an appropriate unit because alleged successor's operations were highly integrated and centralized with successor's other employees; unit did not have a "community of interest sufficiently distinct and separate" from other employees).

When there is compelling evidence that a historical bargaining unit is no longer appropriate, that unit should not be recognized. *See Deferiet Paper Co. v. NLRB*, 235 F.3d 581, 584 (D.C. Cir. 2000). The Board has recognized that where "in reality, and for all practical purposes," employees of two historically separate units have been treated "as one unit for many years," there was a de facto merger of

the units and the successor did not have to recognize separate units. *See Indianapolis Mack Sales & Serv., Inc.*, 288 NLRB 1123, 1127 (1988). For example, in *Trident Seafoods*, this Court found the evidence showed that resident and non-resident processors had the same terms and conditions of employment as well as a combined contract with the same terms applying to both groups of employees. 101 F.3d at 119-120. Therefore, this Court concluded that "[f]or all intents and purposes, the resident and nonresident groups are already functioning as one unit" and the "Board's application of the presumption in favor of historical units is irrational." *Id; see also Indianapolis Mack*, 288 NLRB 1123.

Certainly, that also is the case here. It is undisputed that prior to working for PAOH, the PAOH mechanics had been part of the ILWU coastwise bargaining unit for at least eight years, and for many, much longer than that. (*See* JA 1617-1618). It is also undisputed that they shared the same terms and conditions of employment under the PCL&CA as all other longshoremen up and down the West Coast for those eight years. And, they knew themselves only as ILWU longshoremen for those eight years. (*See, e.g.*, JA 25, 28, 41, 47-48). When PAOH hired mechanics in July 2013, there was nothing for PAOH to do but recognize them as ILWU and continue to abide by the PCL&CA for all of its longshore, including mechanic, and clerk workforce. Thus, "in reality, and for all practical purposes," the 2005 IAM-represented unit was no longer an appropriate unit in July 2013 because the

mechanics were integrated into and became a part of the much larger multi-employer, ILWU coastwise bargaining unit.

Moreover, the historical unit alleged by the GC was no longer appropriate by July 2013 because over the eight years following PCMC's alleged ULPs, the legacy Sealand/Maersk M&R work, the unit work at issue in the *PCMC* case, had all but disappeared at Outer Harbor. In January 2010, when PAOH took over Outer Harbor, Maersk moved all of its ships and work to another terminal in Oakland. (JA 167; *see* 34-35). As a result, Maersk container lifts at Outer Harbor accounted for only 5.5% of the total lifts at Outer Harbor in 2010. (JA 168-170, 1486). In 2011, the percentage dropped to 3%; and in 2012, it dropped to 1.7%. (*Id.*). In 2013, Maersk container lifts represented *less than 1%* (0.78%) of the total volume of container lifts performed by PAOH. (*Id.*). Consequently, M&R work performed by PAOH mechanics on Maersk containers at Outer Harbor was de minimis in 2013. The M&R work performed on Maersk containers also differed from the M&R work performed on other types of containers. (*See* JA 20-21, 34-35, 194-196). Because the unit work at issue in the *PCMC* case represented such a tiny amount of work at Outer Harbor in 2013, the unit addressed in the *PCMC* case was no longer appropriate as of July 2013.

2. ILWU Had Uncoerced Majority Support Among the Alleged Unit.

The Complaint alleged that ILWU never represented an uncoerced majority

of the alleged unit at any time prior to July 1, 2013. (JA 421, 423). The GC had the burden to prove this. *Dairyland USA Corp.*, 347 NLRB 310, 320 (2006) (in cases alleging unlawful 8(a)(2) recognition, the GC bears burden of proving that the union accorded recognition was not the majority representative); *Rainey Sec. Agency*, 274 NLRB 269 (1985) (same); *Regency Gardens Co.*, 263 NLRB at 1269 (1985) (same as to allegations of violation of 8(a)(1) and (2) and 8(b)(1)(A); "[I]nference is no substitute for actual proof, which is the burden of the GC, that the Union did not in fact represent a majority of the Regency garden employees"); *Progressive Const. Corp.*, 218 NLRB 1368, 1371 (1975) ("General Counsel has not met his burden of establishing by a clear preponderance of credible evidence that Carpenters was not the majority representative of Respondent's employees"); *American Beef Packers, Inc.*, 187 NLRB 996 (1971), affirmed by 463 F.2d 818 (D.C. Cir. 1972). However, the GC's evidence fell far short of meeting this burden.

The only thing the Board relies on to support its conclusion that ILWU did not have majority support is the *PCMC II* decision. (D&O at 3, n.10; JA 1740). That decision only addresses events that occurred in March 2005 and makes no factual findings as to the mechanics hired by PAOH in *July 2013*. The only evidence in the record even identifying the mechanics in the alleged unit are JPLRC Minutes NCSF-0087-2013 (JA 1219-1227) and a list of PAOH mechanics provided by PAOH to Region 32 during the Region's investigation (JA 1228-1231). Neither

provides any evidence that ILWU did not have majority support among the PAOH mechanics. Thus, the Board erred in finding that ILWU did not have majority support because the evidence in the record fails to show this at all, let alone by a "clear preponderance of credible evidence."

To the contrary, ILWU's proffered evidence establishes beyond dispute that majority of the PAOH mechanics did support ILWU, either because they chose to be represented by ILWU before March 2005 or because they willingly chose to apply for and take an ILWU mechanic position. The evidence shows that in July 2013, majority of the 53 mechanics PAOH hired had previously chosen to be represented by ILWU:[3]

- 16 or 30.19% were mechanics who chose to be represented by ILWU *before* March 31, 2005 (PCMC ULP date). (JA 1645, 1618).
- 13 or 24.52% began performing M&R work at Outer Harbor between March 2005 and July 2013 by applying for and obtaining an ILWU

[3] These numbers differ from those set forth in ILWU's Offer of Proof. At the time ILWU attempted to present evidence, it was unclear whether crane mechanics were part of the alleged unit. The Board's decision confirms that crane mechanics are not part of the alleged unit (D&O at 3, n.8; JA 1740), with which ILWU agrees, so crane mechanics have been removed from the above calculations. (JA 1228-1231 (identifying the 11 crane mechanics hired by PAOH in July 2013)). Even after removing the 11 crane mechanics, the numbers show that majority of the alleged unit supported ILWU.

steady mechanic job with PCMC through the ILWU-PMA steady hiring process. (*Id.*).

- 10 or 18.87% joined the alleged unit in 2010 when PCMC took over operations from TBCT – *an event the GC conceded was not a ULP*. (*Id.*).
- 14 or 26.41% were former IAM mechanics hired by PCMC on March 31, 2005, who were the subject of the *PCMC* case. (*Id.*).

Thus, the majority of mechanics hired by PAOH in July 2013 supported ILWU, not IAM. These numbers, coupled with the absence of any evidence from the GC to show that ILWU did not have majority support, leaves no question. In fact, even if one were to treat general past IAM affiliation as a basis for believing a mechanic supported IAM in July 2013 (which it does not), that would amount to only 45.5% of the PAOH mechanics (mechanics who worked for PMMC and were IAM prior to March 2005 (14) *plus* mechanics who worked at TBCT and were IAM (10) *equals* only 24 of 53 mechanics, or 45.28%). It is undisputed, however, that 54.71% of the PAOH mechanics supported and chose to be represented by ILWU (mechanics represented by ILWU before March 2005 (16) *plus* mechanics who applied for a mechanic job through the ILWU-PMA process between 4/2005 and 6/2013 (13) *equals* 29 out of 53 mechanics). However, regarding the 10 mechanics who worked for TBCT and had been represented by IAM in 2010, the GC conceded no ULP

occurred regarding that workforce and, thus, there is no basis to assume that those mechanics supported IAM in July 2013. The evidence shows that majority of the PAOH mechanics knowingly and freely selected representation by ILWU.

3. PAOH Had No Reason To Believe that the Alleged Unit Had Majority Support for IAM in July 2013.

The facts and circumstances in July 2013 were as follows: PAOH was a member of PMA and therefore obligated to hire an ILWU workforce, including ILWU mechanics. The former PCMC mechanics were ILWU mechanics and had been represented by ILWU for more than eight years. At June 19 and 21, 2013 JPLRC meetings, PAOH, SSA, PMA and ILWU followed the terms of the PCL&CA to determine which ILWU mechanics PAOH would hire in July 2013. Many of the mechanics attended those meetings and participated in the process, deciding whether they wanted to work for PAOH or for SSA. All of the mechanics PAOH hired in July 2013 were ILWU. Only two days before the mechanics went to work for PAOH, and after PAOH, SSA, PMA and ILWU had already determined who would work for PAOH pursuant to the PCL&CA, PAOH received a letter from IAM's lawyer citing only *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), and demanding recognition for the first time. (JA 74, 153, 157). PAOH had no information indicating that even one of its mechanics supported IAM.

Presented with these facts and circumstances, PAOH had no reason to believe the mechanics it hired in July 2013 were or wanted to be represented by IAM; and

certainly, PAOH at least had a good-faith doubt that majority of the mechanics supported IAM. In fact, majority of the mechanics had not even been affiliated with IAM in 2005. To the contrary, they had been represented by ILWU, many of them since before the 2005 PCMC ULPs.

Had PAOH instead recognized IAM in July 2013, PAOH surely would have been in violation of the Act because an employer cannot recognize a minority union. *Int'l Ladies' Garment Workers' Union*, 366 U.S. 731 (1961). The evidence and testimony ILWU attempted to introduce during trial clearly shows majority of the PAOH mechanics did not support IAM; rather, they supported ILWU. (*See* JA 1643-1711). The record is devoid of any evidence showing IAM had majority support among the unit in July 2013.

III. The Board Committed Reversible Error in Finding that PAOH Was a *Burns* Successor.

A. The Board Erroneously Treated PCMC's Unremedied ULPs as if They Had Been Committed by PAOH.

The Board relied on PCMC's unremedied ULPs as justification for the ALJ's rulings precluding ILWU's evidence and defenses. (D&O at 3, n.9-10; JA 1740). In doing so, the Board essentially attributed PCMC's ULPs to PAOH. There is no dispute, however, that PAOH is an entirely separate company from PCMC. There also is no dispute that PCMC's unlawful failure to recognize and bargain with IAM occurred in 2005, before PAOH even existed. Further, it is undisputed that the ALJ's

decision finding no unlawful conduct by PCMC and ILWU was the *only* operative decision until mere days before PAOH began employing mechanics, and the Board's reversal of that decision was not legitimate until *June 2015*, almost two years *after* PAOH hired longshore mechanics.

In *PCMC II*, PCMC filed a motion requesting to reopen the record to present evidence of changed circumstances. *See PCMC II*, 2016 WL 808825 (March 1, 2016). The Board rejected the motion reasoning that PCMC could not rely on its own unlawful, unilateral changes in arguing that the unit was no longer appropriate. *Id.* ("we do not consider unlawful, unilateral changes made by the Respondent Employer"). In that ruling, the Board cited a number of cases where it had held that respondent employers could not rely on their own unlawful conduct to argue that a bargaining unit is no longer appropriate.[4] Here, however, the scenario is significantly different because the Board has ruled that there was no error in banning evidence and defenses by PAOH and ILWU because of *PCMC's* ULPs, *not* because of PAOH's own unlawful conduct. (D&O at 3). There is no legal support or justification for attributing full blame and consequences for PCMC's ULPs on PAOH, especially here, where PCMC's conduct was not found unlawful in a valid

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[4] The Board cited *Naperville Jeep/Dodge*, 357 NLRB 2252, 2253 (2012), enfd. 796 F.3d 31, 40 (D.C. Cir. 2015), cert denied, 136 S.Ct. 1457 (2016); *Comar, Inc.*, 349 NLRB 342, 357-58 (2007); and *Holly Farms Corp.*, 311 NLRB 273, 279 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995).

Board decision until two years *after* POAH hired longshore mechanics represented by ILWU.[5]

To be sure, there is Board doctrine under which a company may be held responsible for a predecessor's ULPs. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). The instant case, however, does not present a *Golden State* successorship question. Indeed, the GC withdrew the *Golden State* claim and the Board's decision makes no findings as to any *Golden State* claim. Thus, there is no legal justification for the Board's conclusion that PCMC's ULPs are attributed to PAOH.

Although ILWU was party to both cases, whether ILWU lawfully accepted recognition from PAOH depends on whether PAOH was obligated to recognize IAM in the first place. Thus, even if ILWU unlawfully accepted recognition from PCMC in 2005, that does not on its own prohibit ILWU from accepting recognition from PAOH in 2013.

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[5] From the first day it started operations in 2010, PAOH always had an all-ILWU workforce, including the mechanics, all working under the PCL&CA. In July 2013, PAOH hired ILWU mechanics directly (both steady and from the Dispatch Hall), rather than using an ILWU M&R subcontractor. At no time during this period was there a valid Board order instructing ILWU to abandon its representation of PAOH mechanics or requiring PAOH to stop recognizing ILWU – the only union on the facility from 2005 until PAOH closed eleven years later.

B. As a Result of Improperly Attributing PCMC's ULPs to PAOH, the Board Failed To Perform a Proper *Burns* Successor Analysis.

Whether PAOH was a *Burns* successor to PCMC with an obligation to recognize and bargain with IAM depends in part on whether the bargaining unit remained appropriate. (D&O at 2; JA 1739 (stating that an employer is a *Burns* successor only if, among other things, "the unit remains appropriate for collective bargaining under the successor's operations."); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43-44 (1987); *Burns*, 406 U.S. at 280-81. Such a determination requires evidentiary analysis of the specific facts and circumstances as of July 2013. However, as discussed above, the ALJ barred ILWU from putting on its defenses and evidence. Even in the face of a thorough seventy-page Offer of Proof and 228 exhibits showing the inappropriateness of the alleged unit in 2013, the ALJ refused to allow ILWU to present its case and evidence. Pursuant to the Board's procedures, the proffered evidence was rejected and "not received into the record." (NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings, §10396) (Apr 2018). The Board did not reverse the ALJ's rejection of ILWU's Offer of Proof and 228 exhibits but agreed with the ALJ based solely on the erroneous legal conclusion that all of the evidence was barred due to PCMC's 2005 ULPs.

In the D&O, the Board found that PAOH was a *Burns* successor obligated to recognize IAM and that ILWU violated the Act by representing PAOH's mechanics on a record devoid of any facts or evidence about whether the alleged unit, in fact,

was appropriate in July 2013. The record lacks any evidence about the status of the alleged unit between March 2005 and July 2013, evidence that is absolutely necessary to determine whether the unit remained appropriate. And, this is not for lack of such evidence because that is precisely the evidence ILWU attempted to present at trial. By precluding all the evidence ILWU sought to admit on unit appropriateness, the Board could not conduct a proper *Burns* analysis. Thus, this matter should be remanded and the record reopened so ILWU can put on its case and evidence regarding unit appropriateness. Only then can a proper *Burns* successor analysis be performed.

IV. The Board Committed Reversible Error by Denying ILWU's Appeal of the ALJ's Approval of the Non-Board Settlement.

The Board's decision to approve a settlement must apply the proper legal standard and be supported by substantial evidence, like any other Board decision. *Dupuy v. NLRB*, 806 F.3d 556, 561-62 (D.C. Cir. 2015); *Oil, Chemical & Atomic Workers v. NLRB*, 806 F.2d 269, 272 (D.C. Cir. 1986). In determining whether to approve a private settlement and permit withdrawal of a pending complaint,

> [T]he Board should examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act

> or has breached previous settlement agreements resolving unfair labor practice disputes.

Independent Stave Co., 287 NLRB 740, 743 (1987). Fundamentally, the Board should ask "whether the purposes and policies underlying the Act would be effectuated by . . . approving the agreement." *Id.* The Board decision to approve the settlement in this case failed to appropriately apply the correct legal standard and was not based on substantial evidence.

First, the Board erred by approving a settlement that on its face contained no provisions explaining whether backpay would be paid to allegedly injured workers or in what amounts. The settlement provided that all of the money would be paid to the charging party IAM for it to "allocate[] to such payees as the Machinists may designate." (JA 361). In a letter to the NLRB Regional Attorney, IAM counsel sketched out a proposed plan for distribution including payments to some workers; although, nothing in the signed settlement agreement actually required IAM to distribute the money as counsel proposed. (JA 476-481). The agreement itself simply gave $3 million to IAM. The conclusion that this was "reasonable" and "effectuated the purposes and policies of the Act" was legal error. *Independent Stave Co.*, 287 NLRB 740, 743 (1987).

Second, the Board erred in approving IAM's proposed distribution plan because it violated Section 8(b)(1)(A) of the Act by only giving money to people in the bargaining unit who were members of IAM. The plan gave nothing to people in

the bargaining unit who had been or became members of ILWU, even though the complaint sought "make whole" remedies on their behalves. (JA 356-368, 476-481). Section 8(b)(1)(A) prohibits preferences or discrimination based on whether someone participated or declined to participate in union activity, which includes union membership. *Steelworkers Local 2869 (Kaiser Steel Corp.)*, 239 NLRB 982, 982-983 (1978). The Board has applied this provision to the distribution of settlement funds. *Dist. 65, Distributive Workers*, 214 NLRB 1059 (1974); *Puget Sound Area Local #298*, 352 NLRB 792, 793 (2008) (union violated Section 8(b)(1)(A) by discriminating against nonmember unit employees when distributing settlement monies); *Postal Workers Union Local 735*, 342 NLRB 545 (2005) (union violated the Act when it excluded nonmembers from distribution of proceeds from class action grievance); *Postal Workers (Red Bank Local)*, 344 NLRB No. 89 (2005) (decided on default judgment; union violated Section 8(b)(1)(A) by refusing to distribute grievance settlement to unit employee because of non-union membership); *Elec. & Space Technicians Local 1553 (Raytheon Co.)*, 2016 WL 3418761, at *1 (June 21, 2016), *adopting Elec. & Space Technicians Local 1553 (Raytheon Co.)*, 2016 WL 2732018 (May 10, 2016) (union violated Section 8(b)(1)(A) by paying grievance settlement money obtained on behalf of multiple employees only to employee who had volunteered to serve as grievant).

In *Dist. 65, Distributive Workers*, 214 NLRB 1059 (1974), the NLRB's

complaint sought reinstatement and backpay for an entire bargaining unit after the employer closed its facility. The union and employer settled during trial and the union distributed the money only to employees who had engaged in picketing or strike activities. The Board found that the distribution plan "obviously violates Section 8(b)(1)(A)" because "it was the entire unit's loss of jobs and right to reinstatement which were put in issue by the complaint and settled by the parties." *Id.* at 1059. "The Union's discriminatory dispersal of those funds to only those employees who actively engaged in picketing or related activities clearly was based on support of the Union and clearly restrained and coerced employees in the exercise of their Section 7 right not to engage in such activities." *Id.*

The same core facts are present here. The complaint alleged that the entire unit suffered monetary losses by becoming subject to the PCL&CA and the entire unit was thus entitled to a make-whole remedy. (JA 287-288). However, under IAM's proposal, settlement monies would be given only to those employees who had exercised their Section 7 right to join IAM and monies were denied those who exercised their Section 7 right to join ILWU. (*See* JA 434-439, 476-481). Thus, the distribution plan itself coerced employees in the exercise of their Section 7 rights. The Board committed legal error by approving it.

Third, the Board erred by approving the settlement based on the proposed plan for distribution of backpay because the plan was not supported by the evidentiary

record. (*See* JA 435-440). As a preliminary matter, the record contained no baseline assessment of how many individuals might be entitled to backpay under the Complaint and what amount each person might be owed. The charges had been pending for almost two years at the time of the settlement and IAM had been through settlement negotiations with the employers during which it could have requested any payroll information needed to conduct a full backpay analysis. Yet, counsel for IAM conceded that his client had "no specific information" about amounts owed to any worker other than the basic information contained in the two unions' collective bargaining agreements. (JA 478). Without a baseline as to what full backpay may be, IAM's distribution plan was arbitrary at best. *See Dupuy*, 806 F.3d at 566 (NLRB erred by finding that settlement gave employee equivalent job terms to those held by similarly-situated employees where record contained no evidence of comparators' job terms).

The absence of a baseline total backpay assessment also was contrary to the Board's own policies on evaluating private settlements. The Board's Manual instructs, "Backpay calculations and information regarding remedies should be accurately set forth in the [NLRB Region's] case file. If the Region determines it is not feasible or necessary to calculate backpay, the file should document the reasons for this determination." NLRB Casehandling Manual, Part 1, §10124. No such evidence was presented. The Board failed to explain why it was ignoring its own

internal policies.

IAM's representations and work records proffered by ILWU showed additional problems with IAM's proposed backpay distribution plan. IAM's plan provided $2,056,870.95 of the $3 million to 58 IAM mechanics who were divided into three tranches ostensibly based on work history:

(1) The majority of that amount would be paid to 37 mechanics who would receive $45,000 each;

(2) Another 14 people would receive $14,642.85 each;

(3) Another seven people would receive $5,000 each.

(JA 476-481). Careful review showed that membership in each category was unfounded and arbitrary, rendering the scheme unreasonable. (*See* JA 436-439).

The first tranche provided for the greatest payments of $45,000 each. IAM explained that 35 of the workers were included in this category because they "were on the PAOH list [and] were hired [by PAOH] as of July 1, 2013, when [PAOH] began operation. Those 35 remained still working at the time of the closure [in 2016]." (JA 478). Uncontroverted evidence offered by ILWU showed that nine of the 35 never worked for PAOH at all, thus casting doubt on their entitlement to the highest recoveries under IAM's plan. (JA 436-438, 494-609, 773-1010, 1079-1187).

The ALJ brushed ILWU's evidence aside finding that these nine (and others) were entitled to recovery under the *Golden State* theory because they had been a part

of the "historical IAM-represented unit whether they were employed by PMMC, PCMC, TraPac, TBCT, and/or POAH." (JA 415). But this only addresses why the nine individuals might be entitled to some amount of backpay under some theory alleged in the Complaint. The ALJ and Board did not address why these nine were entitled to highest level of backpay ($45,000 each) even though they did not meet the work history criteria that IAM itself established.

IAM's plan also provided $45,000 to another mechanic who became disabled at some point. (JA 438, 478). The Board failed to consider why an individual who became disabled and unable to work was entitled to the highest level of backpay when disability is an intervening cause of wage loss that ordinarily eliminates or tolls a claim for backpay under Board law. *E.g.*, *In Re Performance Friction Corp.*, 335 NLRB 1117, 1119 (2001); *Southern Stevedoring Co.*, 236 NLRB 860, 864 (1978), *enfd. mem.* 591 F.2d 101 (5th Cir. 1979).

Regarding the second tranche, IAM said $14,642.85 would be paid to the 14 "former PMMC and Transbay mechanics who were hired by PCMC, … but did not go to work for PAOH" for various reasons. (JA 478). IAM's own proposal showed that the members of this group worked for different periods of time and should, thus, be entitled to different amounts of money. (JA 478-480). In addition, ILWU offered uncontroverted evidence that two of the people in this group were not "hired by PCMC," as IAM asserted. Instead of going to PCMC, they applied for a job with

another PMA company and were hired. (JA 438-439, 642-672, 857-919).

Membership in the third tranche was similarly shown to be unrelated to the theories of the Complaint. These seven people were slated to receive $5,000 each even though they "were never hired by PCMC, but chose to retire at that time or later." (JA 478). There is no legal basis for these payments, which suggests, along with the other defects, that IAM sought to distribute monies for its own political or other undisclosed reasons. The Board erred by approving the scheme anyway.

Fourth, the Board erred by approving the distribution plan's legally and factually unfounded payment of $151,871.05 to IAM for "legal fees and expenses." (JA 481). Attorneys' fees are not an available remedy under the Act and were not sought in this case, as the ALJ correctly found. (JA 386-387). IAM's specific fee request was factually unsupported also. The ALJ relied on IAM's "approximate[s]" of its "billing." IAM conceded that much of the work was done under a retainer, which undoubtedly also covered other IAM matters. (JA 373). Thus, it was unclear whether the payment was intended to reimburse IAM for what it paid for legal fees and costs including what IAM paid for the retainer, or whether the approximates reflect fees and costs IAM incurred at some unspecified hourly rate setting aside the retainer. A settlement must vindicate public rights. *Independent Stave*, 287 NLRB at 741. No public rights protected by the Act are vindicated by diverting a backpay remedy to pay the charging party's legal fees.

Finally, no evidence supported the ALJ's conclusion that the settlement "specifically excludes IAM lost dues." (JA 384). IAM represented the opposite telling the ALJ that "part of this money [paid to IAM] is to recompense the Charging Party for those lost dues check-off," although it is impossible to tell which part. (JA 478).

The parties to the settlement will argue that ILWU lacks standing to challenge it. The Board declined to reach the argument, which has no merit. "[S]tanding to appeal an administrative order as a 'person aggrieved,' 29 U.S.C. §160(f), arises if there is an adverse effect in fact, and does not . . . require an injury cognizable at law or equity." *Retail Clerks Union*, 348 F.2d at 370 (holding that union not a party to the settlement had standing to appeal a Board order entered as a result of settlement); *accord Oil, Chem. & Atomic Workers Local Union No. 6-418*, 694 F.2d at 1294. Here, the Board's order provided for the arbitrary and unfounded distribution of money among people for whom ILWU is the current collective bargaining representative. While the Complaint in this case contends that ILWU should not have become the PAOH mechanics' representative, there is no dispute that ILWU is the representative of these individuals now. The Complaint does not demand that ILWU stop representing them. (*See* JA 417-428). Since PAOH closed in 2016, the mechanics previously employed by PCMC and/or PAOH have gone to work for other PMA-member employers or work out of the Dispatch Hall and remain

members of the ILWU coastwise bargaining unit. ILWU has an interest in ensuring a reasonable and fair distribution of monies among the workers it represents.

V. The Board's Affirmative Bargaining Order and Remedy that ILWU Reimburse All Unit Employees for All Initiation Fees, Dues and Other Monies Paid Under the PCL&CA Should Be Vacated as Contrary to the Policies of the Act.

Under the unique posture of this proceeding even if this Court affirms the Board's findings, it should nonetheless for several reasons vacate the bargaining order and the remedy that seeks ILWU "[r]reimburse all present and former unit employees for all initiation fees, dues, and other moneys paid by them or withheld from their wages pursuant to the PMA-ILWU Agreement, with interest." (D&O at 5-6; JA 1742-1743). These "remedies" are contrary to the facts and circumstances specific to this matter and utterly fail to remedy the alleged ULPs, which is supposed to be the sole purpose of any remedy ordered under the NLRA.

A. The Affirmative Bargaining Order Is No Remedy at All.

The operative Complaint did *not* seek a bargaining order. During trial, the GC chose to remove her request for a bargaining order from the Complaint because, by that time, PAOH had filed bankruptcy and, in March 2016, shut its doors with no intention to ever resume operations of any sort anywhere. All parties – the GC, IAM, PAOH, and ILWU – stipulated to this on the record. (JA 246-247). Thus, the GC made the conscious decision not to seek a bargaining order for very good reason – the alleged unit was no longer an appropriate unit for the obvious reason that it

ceased to exist.

Yet, the ALJ recommended and the Board issued a bargaining order justified by imaginary remedial benefits, despite the fact that "in selecting a remedy for NLRA violations, the NLRB must select a course that is remedial rather than punitive, and choose a remedy which can fairly be said to effectuate the purposes of the Act." *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1067 (D.C. Cir. 2001). In the D&O, the Board attempts, but utterly fails, to justify the bargaining order under the standard required by this Court. An affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balance of three considerations: (1) the employees' §7 rights; (2) whether other purposes of the Act override the rights of the employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000). This Court has made clear that the Board must consider the appropriateness of a bargaining order at the time the order is issued. *Cogburn Health Center, Inc. v. NLRB*, 437 F.3d 1266, 1273 (D.C. Cir. 2006); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1172 (D.C. Cir. 1998); *Charlotte Amphitheater*, 82 F.3d at 1080. The Board quotes this Court's requirement and proceeds to argue that a bargaining order is appropriate but conveniently ignores the facts and circumstances in this case – namely, that PAOH has closed its doors and all parties stipulated that it will never

resume operations. This alone makes an affirmative bargaining order inappropriate here because employees' §7 rights are not vindicated by an order to bargain when the employer and unit no longer exist and other remedies are adequate to remedy the violations of the Act. *See Charlotte Amphitheater*, 82 F.3d at 1080 (declining to enforce bargaining order because "[t]he Board, however, has given no indication that it has taken the employees' section 7 rights into consideration. Nor has it explained why other traditional remedies at its disposal, are not enough . . ."); *Douglas Foods*, 251 F.3d at 1067 (collecting cases). Taking into account the current facts of this case, this Court should vacate the Board's affirmative bargaining order because the Board has failed to adequately justify it, the order would be futile, and the record in this case cannot support a bargaining order. *See NLRB v. Maywood Plant of Grede Plastics*, 628 F.2d 1, 7 (D.C. Cir. 1980), citing *Brockway Motor Trucks, Div. of Mack Trucks, Inc. v. NLRB*, 582 F.2d 720, 740 (3d Cir. 1978) (declining to enforce bargaining order where manufacturer ceased operations because it would "constitute a futile act")). "[A] bargaining order is not a snake oil cure for whatever ails the workplace; it is an extreme remedy . . . that must be applied with commensurate care." *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938-39 (D.C. Cir. 1991).

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B. The Specific Facts and Circumstances Do Not Support Reimbursement of Initiation Fees, Dues, and Other Monies by ILWU.

To require ILWU to reimburse initiation fees and dues paid to mechanics it has represented for over a decade does not carry out the purposes of the Act, exceeds the Board's statutory authority because it is punitive to ILWU, and is a windfall, rather than a make whole remedy, to unit employees. The unit employees received representation from ILWU during the entire time they were employed by PAOH – July 2013 through PAOH's closure in 2016. The employees also received highly valuable terms and conditions of employment from ILWU's representation of them within the ILWU coastwise bargaining unit. Had these employees been represented by IAM rather than ILWU, they would have paid similar union dues to IAM. In addition, the alleged unit ceased to exist with the closure of PAOH; but thanks to ILWU's representation, all of the employees who were in the alleged unit continue to have employment, whether they secured steady jobs with other PMA employers or work for different PMA employers on a daily basis out of the Dispatch Hall. (JA 1627, 1679-1681, 1693, 1698, 1703-04, 1709-1710).

In addition, PAOH and MTC have paid a substantial monetary settlement of $3 million to IAM to make the alleged unit employees whole. Given that IAM has received this large settlement that it was supposed to distribute to unit employees, the alleged unit employees received ILWU job security and benefits unavailable to

them if they had been represented by IAM, and well-established precedent provides for joint and several liability between the union and the employer for back dues and fees, the former PAOH mechanics have already been made whole for any alleged potential financial losses caused by ILWU's representation of them from July 2013 through PAOH's closure in March 2016. Therefore, requiring ILWU to reimburse dues to the unit employees would exceed any "make whole" remedy for them. It is well established that any Board remedy that exceeds losses incurred from a ULP constitutes impermissible punitive relief, which the Act prohibits. *See, e.g., H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (the Act authorizes only "make whole" and not punitive remedies); *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1009 (D.C. Cir. 1998) ("[T]he Board's remedy must be truly remedial and not punitive."), citing *NLRB v. Strong*, 393 U.S. 357, 359 (1969).

Moreover, ILWU acted reasonably and in good faith in its representation of the PAOH mechanics within the ILWU coastwise unit. The mechanics had already been in the ILWU bargaining unit for more than eight years, with many having been represented by ILWU for much longer. ILWU also relied on the ALJ's decision in the *PCMC* case, which was not reversed until June 17, 2015. At all times, ILWU represented the mechanics in good faith and ensured that they received all rights and benefits to which they are entitled under the PCL&CA, including the ability to return to the Dispatch Hall and continue working on the waterfront when laid off, which

the PAOH mechanics did when PAOH closed its operation.

Even if the Court determines that reimbursement of dues is appropriate, the remedy must be modified to ensure that the proper unit employees are reimbursed. Any dues reimbursement remedy should exclude any alleged unit employees who joined ILWU prior to March 31, 2005, the date of the alleged ULPs in the *PCMC* case. That is what was ordered in the *PCMC* case. *PCMC II*, 362 NLRB No. 120, *2 (Respondents "will be ordered jointly and severally to reimburse all present and former unit employees *who joined the Respondent Union on or since March 31, 2005*, for any initiation fees, periodic dues…") (emphasis added). Here too, the remedy should be so qualified because those employees chose to be represented by ILWU prior to any of the alleged ULPs, in this case or in the *PCMC* case. (JA 1618); s*ee, e.g., Human Dev. Ass't's*, 293 NLRB 1228, 1229 (1989); *Control Servs. Inc.*, 319 NLRB 1195, 1196 (1995). The remedy also should be qualified to limit any reimbursement only to the time the alleged unit employees worked as a steady mechanic for PAOH.

Due to these unique circumstances, the Court should reverse the Board's remedy that ILWU reimburse the PAOH mechanics their initiation fees and dues.

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CONCLUSION

For the reasons set forth herein, this petition for review should be granted, the Board's cross-application for enforcement should be denied, and the Board's Order should be vacated. Alternatively, the matter should be remanded so ILWU may present its case and evidence.

Dated: November 30, 2018

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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Dated: November 30, 2018 LEONARD CARDER, LLP

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STATUTORY ADDENDUM

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STATUTORY ADDENDUM

Section 8(a)(1), (2), (5) of the NLRA (29 U.S.C. § 158(a)(1-3, 5)):

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(b)(1), (2) of the NLRA (29 U.S.C. § 158(b)(1-2)):

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

Section 8(d) of the NLRA (29 U.S.C. § 158(d)):

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to

discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.